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No. 87 -

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WILLIAM DERR,
Petitioner,

v.

KAWASAKI KISEN K.K.,
Respondent.

THOMAS ROBERTSON,
Petitioner,

v.

TOKAI SHOSEN K.K.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where cargo was stowed aboard a ship in a negligent manner by a foreign stevedore, and during unloading in a U.S. port, the cargo fell from its place of stowage as a result of the improper manner of stowage, and struck petitioner-longshoreman, who brought suit against the ship under Section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C., Section 905(b), did not the Third Circuit err in ruling (in conflict with decisions of the Fifth and Ninth Circuits), that the shipowner's duty of reasonable care owed to longshoremen did not extend to an unsafe condition resulting from the manner in which the cargo had been stowed?

2. Whether the court below erred in holding that the custom in the maritime industry that the crew of a ship inspects the manner in which cargo is stowed aboard

the ship at the time of loading, did not impose a duty on the ship to exercise reasonable care with respect to any unsafe conditions which such an inspection would disclose?

3. Did not the court below err in holding (in conflict with decisions of the Fourth, Fifth and Ninth Circuits) that a ship's duty of reasonable care owed to longshoremen with respect to the "work spaces" of a ship, as that term was used in Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 81 L.Ed.2d 1 (1981), did not include an unsafe condition in the cargo hold resulting from the unsafe manner in which cargo was stowed?

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States

Petitioners, William Derr and Thomas Robertson, respectfully pray that a Writ of Certiorari issue to review two Judgments and the Opinion of the United States

Court of Appeals for the Third Circuit entered on December 15, 1987, holding that the shipowner's duty of reasonable care owed to longshoremen did not extend to unsafe conditions resulting from the manner in which cargo had been stowed aboard a ship in a foreign port prior to the ship's arrival at the port of discharge in the United States, and further holding that a shipowner has no duty to inspect the manner in which cargo has been stowed aboard its ship in order to discover and remedy unsafe conditions which would create a danger to longshoremen engaged in unloading that cargo, and in support thereof represent as follows:

OPINIONS BELOW

The within two cases were tried separately in the District Court and consolidated on appeal for purposes of argument and disposition. The Opinion of the United States Court of Appeals for the

Third Circuit on the consolidated appeals is officially reported at 835 F.2d 490 (3rd Cir. 1987), and is reproduced in the Appendix hereto (1a). The Bench Opinion of the United States District Court for the Eastern District of Pennsylvania in Derr v. Kawasaki Kisen K. K. is not officially reported, and is reproduced in the Appendix hereto (21a). The Memorandum Opinion of the United States District Court for the Eastern District of Pennsylvania in Robertson v. Tokai Shosen K.K. is officially reported at 655 F.Supp. 152 (E.D. Pa. 1987), and is reproduced in the Appendix hereto (80a).

JURISDICTION

The Judgments of the United States Court of Appeals for the Third Circuit in both appeals were entered on December 15, 1987 (17a, 18a). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISION INVOLVED

Longshoremen's and Harbor Workers' Compensation Act, Section 5(b), 33 U.S.C. Section 905 (b)

> (b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreement or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy

> provided by this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

LEGISLATIVE HISTORY INVOLVED

The Legislative History of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, as set forth in House Report No. 92-1441, is reprinted in 1972 U.S. Cong. & Adm. News, Vol. 3, at page 4698. The portion of that Legislative History relating to the adoption of Section 5(b) of the Act and the elimination of the unseaworthiness remedy, which appears at 1972 U.S. Cong. & Adm. News, pages 4701 through 4705, is reproduced in the Appendix hereto (92a).

STATEMENT OF THE CASE

Both the within actions originated as suits brought by longshoremen to recover damages for personal injuries which they suffered while working aboard ships in navigable waters of the United States. In each case, District Court jurisdiction was based on 28 U.S.C., Section 1332, diversity of citizenship, and 28 U.S.C., Section 1331, an action arising under the laws of the United States, to wit, Section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C., Section 905(b).

The essential operative facts in each case are the same.

In both cases, petitioners were longshoremen engaged in discharging cargo from ocean going ships who were injured when cargo fell from a stow of cargo in the ship's hold and struck them (3a). The cargo which fell and injured the

petitioners had been loaded on the ships by independent stevedores in foreign ports prior to the arrival of the ships at the ports of discharge in the United States (3a).

In both cases, there was evidence that, during the course of the voyage from the foreign loading ports to the discharge ports in the United States, the cargo which fell and struck the petitioners had shifted or moved from the position in which it originally had been stowed (3a). Petitioners presented evidence that the cause of this shifting or movement of the cargo was the failure to have the cargo properly secured at the time it was loaded.

At trial, petitioners offered expert testimony as to how the cargo should have been secured in conformity with proper maritime practice, and that if the cargo had been so secured then it would not have

shifted during the ocean voyage (3a). Petitioners also presented evidence that, as a result of the shifting or movement of the cargo during the ocean voyage, the cargo stow was not in a stable condition when the discharging operations commenced, and that this lack of stability was a substantial factor in causing the cargo to fall from the stow and injure them.

In Derr v. Kawasaki Kisen K.K., the petitioner was discharging packages of lumber which were approximately three feet high, three or four feet wide and of various lengths, when one of these packages of lumber fell from the cargo stow and landed on his foot. There was evidence that no shoring or dunnage was used in the stow to secure the lumber in place and prevent it from moving.

In Derr, petitioner presented expert testimony that shoring or dunnage should have been used to secure the cargo. This

testimony was confirmed by testimony from the Captain of the ship who stated that such shoring should have been used (63a-64a).

The Captain of the ship further testified that he thought that someone from the ship's crew was assigned to observe the loading of the cargo on the ship (41a), but when petitioner sought to offer expert testimony that there was a world wide custom in the maritime industry for a deck officer of the ship to be present to observe cargo loading operations, the Trial Judge struck the testimony (8a-9a, 25a).

In Robertson v. Tokai Shosen, K.K., petitioner was struck by a coil of steel rod which fell from a cargo stow shortly after he had entered the cargo hold. Petitioner offered expert testimony that the cargo stow of coils of steel rod had not been lashed and secured properly.

There also was evidence that the cargo hold had been inspected by the ship's Chief Officer prior to the start of cargo operations and testimony from a surveyor employed on behalf of the ship that he had observed and photographed the stow prior to the start of the discharging operation, and that he saw that the stow had "moved" (15a-16a).

In both Derr and Robertson, the respective trial judges granted the shipowners' Rule 50 motions for a directed verdict at the conclusion of the petitioners' cases, holding that a shipowner had no duty to inspect how cargo was loaded aboard its ship so as to discover and remedy unsafe conditions which might endanger discharging longshoremen. In so ruling, neither trial judge suggested that his decision was in any way based on any failure on the part of the petitioners' stevedore employers to perform their work

in a proper manner. Rather, the trial judges held that the shipowners owed no duty to discharging longshoremen with respect to unsafe conditions arising from the manner in which cargo was stowed.

The Court of appeals for the Third Circuit affirmed, holding as follows:

(1) A shipowner has no duty to inspect the manner in which cargo is loaded in a foreign port to discover unsafe conditions which might endanger discharging longshoremen -- specifically rejecting, and in clear and unequivocal conflict with -- the contrary decision of the Ninth Circuit in Turner v. Japan Lines, Ltd., 651 F.2d 1300 (9th Cir. 1981), cert. denied, 459 U.S. 967, 74 L.Ed.2d 278 (1982) (10a-11a).

(2) The fact that there may be a custom or practice in the maritime industry to observe cargo loading operations does not impose upon shipowners a duty to

exercise reasonable care with respect to any unsafe conditions which would be disclosed by such observations (9a) -- a holding which is in conflict with this Court's decision in Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 81 L.Ed.2d 1 (1981).

(3) When this Court held in Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 81 L.Ed.2d 1 (1981), that the shipowner's duty of reasonable care extended to the "condition of the ship's gear, equipment, tools and work space to be used in the stevedoring operation," the term "work space" was limited to the "physical work space" of the ship rather than an unsafe condition of the space," i.e., the cargo hold, -- resulting from the manner in which cargo had been stowed in the hold (13a).

(4) The ship's duty to intervene with respect to unsafe conditions is

limited to unsafe conditions of its equipment, i.e., there is no duty to intervene to remedy an unsafe condition created by cargo negligently loaded by a foreign stevedore (14a).

(5) Since a shipowner has no duty to inspect cargo stowage operations, there is no duty to warn of any unsafe conditions in the stowage, unless the shipowner actually knows of the unsafe condition and it is not open and obvious (15a).

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

The decision below is in conflict with the Ninth Circuit's decision in Turner v. Japan Lines, Ltd., 651 F.2d 1300 (9th Cir. 1981), cert. denied, 459 U.S. 967, 74 L.Ed.2d 278 (1982), the Fifth Circuit's decision in Lemon v. Bank Lines, Ltd., 656 F.2d 110 (5th Cir. 1981), and the principles set forth in the legislative history of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act.

In Turner v. Japan Lines, Ltd., 651 F.2d 1300 (9th Cir. 1981), cert. denied, 459 U.S. 967, 74 L.Ed.2d 278 (1982), a case decided shortly after this Court's decision in Scindia Steam Navigation Co. v. De Los Santos, 451 U.S., 156, 81 L.Ed.2d 1 (1981), the Ninth Circuit held that the shipowner's duty of reasonable care extended to dangerous conditions created by foreign stevedores "of which the vessel could, in the exercise of reasonable care, have corrected or warned of," see 651 F.2d at 1304.

Similarly, in Lemon v. Bank Lines, Ltd., 656 F.2d 110 (5th Cir. 1981), a case which was tried before this Court's decision in Scindia, see 449 F.Supp. 1016 (S.D. Ga. 1978), but in which the appeal was not decided until after Scindia, with the appellate decision being based on Scindia, the Court affirmed a verdict in favor of an injured longshoreman in which the jury found that "the shipowner was negligent with regard to the method of stowing the cargo", see 656 F.2d at 117.[1]

The Third Circuit, in its Opinion in the instant cases, did not specifically consider the Fifth Circuit's decision in Lemon. However, it did address the Ninth Circuit's decision in Turner, and rejected it, stating "We cannot accept the Turner analysis" (11a). Since Lemon, like

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1. In Lemon, as in Turner and the instant two cases, the cargo had been loaded in a foreign port by a foreign stevedore, see 449 F.Supp. at 1019.

Turner, holds that a shipowner may be held responsible for an unsafe condition created by a foreign loading stevedore, it is clear that the Third Circuit, in the decision below, has placed itself in clear and unequivocal conflict with two long-standing decisions from the Fifth and Ninth Circuits respectively.

In enacting the 1972 amendments to the Longshoremen's and Harbor workers' Compensation Act, Congress expressed particular concern that the negligence remedy which it was creating be applied uniformly throughout the different ports of the United States. This intent is specifically set forth in the legislative history (105a):

> Finally, the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located.

The decision below, if allowed to stand, will result in the law which will

be applied in ports such as Philadelphia, Pennsylvania, Camden and Gloucester, New Jersey, and Wilmington, Delaware, being different from the law which will be applied in ports such as New Orleans, Louisiana, Mobile, Alabama, San Francisco, California, and Portland, Oregon. In view of the Congressional mandate that the longshoreman's negligence remedy be applied uniformly throughout the United States, there is a compelling necessity for review by this Court to resolve the conflict in Circuits created by the decision below.

The decision below is in error in several respects, but its most significant flaw lies in the failure of the court below to distinguish between unsafe conditions caused or created during the cargo operations performed by the injured longshoreman's stevedore-employer, -- conditions which the longshoreman's stevedore

employer presumably is in the best position to prevent, -- and unsafe conditions created by others, which the injured longshoreman's stevedore-employer is powerless to prevent.

The negligence remedy which Congress enacted in the 1972 Act was to be based on shore-side principles of negligence law. The legislative history states (98a-100a):

> The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, . . .
>
> . . . .
>
> Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition. (Emphasis supplied)

Under land-side law, contrary to the holding of the Third Circuit in the instant case, the employer of an independent contractor, who would be in a position comparable to that of a shipowner who has hired an independent stevedore to load cargo aboard a ship, is not insulated from responsibility for inspecting the work of that contractor upon completion so as to provide for the safety of those who subsequently may suffer injury if that work has not been performed in a safe and proper manner. The applicable principle is set forth in Section 412 of the Restatement of Torts, Second, as follow:

> Section 412. Failure to Inspect Work of Contractor After Completion
>
> One who is under a duty to exercise reasonable care to maintain land or chattels in such condition as not to involve unreasonable risk of bodily harm to others and who entrusts the work of repair and maintenance to an independent contractor, is subject to liability for bodily harm caused to them by his failure to exercise such care as the circumstances may reasonably require him to exercise to

ascertain whether the land or chattel is in reasonably safe condition after the contractor's work is completed. (Emphasis supplied)

It would be totally unrealistic and far-fetched to even suggest that the crew of a ship does not inspect the manner in which the cargo the ship is carrying has been stowed. Shipping companies are in the business of carrying cargo. They are legally responsible for the condition of that cargo on delivery. No competent ship's Captain would ever consider going to sea without having first assured himself that the cargo in his ship was properly stowed and secured, as the safety and stability of the ship on the ocean voyage is dependent upon this. Nor would any shipowner employ a Captain who would not take care to see that the cargo the ship is carrying is carefully secured so as not to be damaged on arrival and subject the vessel to a cargo damage claim. In this regard, the comments of the

authors of the Article "Proof of Third-Party's Negligence In Action Under the Longshore and Harbor Workers' Compensation Act", 44 Am Jur Proof of Facts 2d 147, 187 (1986), are apropos:

> The most common, and most useful, custom that can be proved in Section 905(b) suits is the inspection by the ship's crew and officers of the loading (as opposed to discharging) operation. Any knowledgeable expert witness will testify to this proposition in general; it cannot be denied in the context of conventional general cargo vessels. Thus, one's own witness' testimony on this point can be corroborated by cross-examination of the deck officer or captain, who will not likely admit that he does not customarily keep a watch on loading." (Emphasis supplied)

In the legislative history of the 1972 Act, Congress emphasized that the purpose of the elimination of the unseaworthiness remedy was to relieve shipowners from liability for unsafe conditions caused or created by the injured longshoreman's stevedore-employer, not those caused or created by some stevedore

in another port who has no responsibility for the safety of the injured longshoreman. This is emphasized in the legislative history, which repeatedly states that it is only from liability for conditions attributable to stevedores subject to the Longshoremen's Compensation Act, i.e., the injured longshoreman's employer, that the shipowner is being relieved. Thus, the legislative history states (99a-100a):

> Persons to whom compensation is payable under the Act retain the right to recover damages for negligence against the vessel, but under these amendments they cannot bring a damage action under the judicially-enacted doctrine of unseaworthiness. Thus a vessel shall not be liable in damages for acts or omissions of stevedores or employees of stevedores subject to this Act. Crumedy v. The J. H. Fisser, 358 U.S. 423, Albanese v. Matts, 382 U.S. 283, Skibinski v. Waterman SS Corp., 330 F.2d 539; for the manner or method in which stevedores or employees of stevedores subject to this Act perform their work, A. N. G. Stevedores v. Ellerman Lines, 369 U.S. 355, Blassingill v. Waterman SS Corp, 336 F.2d 367; for gear or equipment of stevedores or employees of stevedores subject to this Act whether used aboard ship, or ashore, Alaska

SS Co. v. Peterson, 347 U.S. 396, Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315, or for other categories of unseaworthiness which have been judicially established. This listing of cases is not intended to reflect a judgment as to whether recovery on a particular factual setting could have been predicated on the vessel's negligence. (Emphasis supplied)

The holding of the court below that a shipowner has no responsibility for unsafe conditions created by loading stevedores is without foundation in the legislative history, and is contrary to the specific mandate of Congress that longshoremen have a negligence remedy based on land-side principles of negligence law. The decision below, if allowed to stand, will place longshoremen at the mercy of foreign stevedores, and will defeat the expressed purpose of Congress in enacting a negligence remedy of encouraging vessel safety. The Ninth Circuit correctly analyzed the situation in Turner (651 F.2d at 1304):

> . . . imposing a duty on the Owner or Time-Charterer or both in this

case should further the congressional goal of safety. The foreign stevedore, who is presumably primarily at fault, may in many cases be beyond reach of the court's processes, and the injured longshoreman would be unable to sue it. As between the vessel and the stevedore-employer, the vessel is the only one in a position to ensure the safety of the longshoremen. The offloading stevedore has no control whatsoever over the foreign stevedore. The vessel, on the other hand, can ensure safety by choosing a reliable foreign stevedore, supervising its work when necessary, and warning the offloading stevedore of concealed dangerous conditions created by the foreign stevedore. We do not believe that Congress, in enacting a careful scheme of compensation and liability, could have meant to leave the longshoremen to the mercies of foreign stevedores against which he may have no rights or, at least, no practical remedy. We hold, therefore, that the vessel had a duty to protect the plaintiff against concealed dangers created by a foreign stevedore which the vessel could, in the exercise of reasonable care, have corrected or warned of. (Emphasis supplied)

II.

The holding below that the custom in the maritime industry of inspecting the manner in which cargo is stowed imposed no duty of inspection on a shipowner is in conflict with this Court's decision in Scindia Steam Navigation Co. v. De Los Santos, 451 U.S.156, 81 L.Ed.2d 1 (1981), and raises an issue of importance with respect to the interpretation of the shipowner's duty of reasonable care.

This Court, in Scindia, supra, in discussing the shipowner's duty of inspection, distinguished between conditions existing at the start of cargo operations, with respect to which the shipowner "was chargeable with knowledge," see 451 U.S. at 178, 68 L.Ed.2d at 19, and conditions arising after the start of cargo operations. Scindia held that there was no "general duty" of inspection with respect to conditions developing after the start of cargo operations, with the important proviso that such duty of inspection might arise by virtue of contract provision, positive law, or custom to the contrary.

Thus, this Court noted, 451 U.S. at 172, 68 L.Ed.2d at 15:

> We are of the view that absent contract provision, positive law, or custom to the contrary -- none of which has been cited to us in this case -- the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore. (Emphasis supplied)

In the instant cases, the unsafe conditions of the cargo hold existed prior to the start of cargo operations by the plaintiffs' stevedore employers, and thus fell within those categories of unsafe conditions with which the shipowner was "chargeable with knowledge." Nonetheless, and in an abundance of caution, petitioner in Derr v. Kawasaki Kisen K.K. offered expert testimony that there was a custom in the maritime industry to inspect the manner in which cargo is loaded and secured. The trial judge excluded this testimony and, on appeal, the Third

Circuit held that the fact that the ship's officers may customarily observe cargo operations "cannot be used to reimpose the general duty to supervise the stevedore" (9A). In so holding, the Third Circuit has failed to understand the purpose of the offered testimony and is refusing to follow the direction of this Court in Scindia that custom is a relevant consideration in determining the vessel's duty of inspection, see Scindia, 451 U.S. at 172, 68 L.Ed.2d at 15.

The proffered evidence with respect to proof of custom was not designed to "reimpose" any general duty of supervision of a foreign stevedore by the shipowner, even assuming that such a duty ever existed; rather, it was offered to prove the vessel's knowledge, or at least its opportunity to obtain knowledge, of unsafe conditions arising from the manner in which cargo was stowed. The shipowner's

duty of care arises from its knowledge of an unsafe condition. The issue is not whether the vessel is to supervise the conduct of the foreign stevedore, but, rather, is the shipowner under a duty to use reasonable care to discover unsafe conditions, whether created by a foreign stevedore or otherwise. Simply put, if an unsafe condition is capable of being discovered by reasonable inspection, and if there is a custom in the maritime industry to make such an inspection, then, under basic principles of tort law, the shipowner should be held to a duty of reasonable care with respect to any unsafe conditions which such a reasonable inspection would disclose. The evidence of custom which petitioner Derr sought to present was a relevant consideration in determining the nature of the conditions of which the shipowner should have been aware and should have taken corrective

action.

The role of the custom in the maritime industry of inspecting the manner in which cargo is loaded is a matter of importance in shipboard operations. The Third Circuit's failure to permit this evidence of custom presents an issue of importance which warrants consideration by this Court to insure that the lower courts will correctly apply the rulings made in the Scindia decision.

III.

The holding below that the term "work space," as used by this Court in Scindia, referred only to the physical condition of the work space, and not to an unsafe condition existing in the work space, is an incorrect reading of the Scindia decision, and is in conflict with decisions of the Fourth, Fifth and Ninth Circuits.

In Scindia, supra, this Court held that the ship's duty of reasonable care extended to the "work spaces" of the ship, see Scindia, supra, 45 U.S. at 167, 81 L.Ed.2d at 12:

> The shipowner thus has a duty with respect to the condition of the ship's gear, equipment, tools and work space to be used in the stevedoring operation; . . . (Emphasis supplied)

The holds of a cargo ship -- the place where longshoremen perform their work -- quite clearly fall within the definition of a "work space" of a ship. Should cargo in that work space be in an unstable condition and in danger of falling -- as in the instant two cases -- there would be an unsafe condition of that

"work space" within the common understanding of that term. The court below, however, thought otherwise, holding that when this Court used the phrase "work space" in Scindia, the meaning of this phrase was limited to the "physical work space," and that this Court intended a distinction between a defect in the physical structure of a cargo hold and an unsafe condition resulting from the manner in which cargo was stowed in the hold (13a). In so holding, the Third Circuit placed itself in conflict not only with the decision of the Ninth Circuit in Turner, supra, and the decision of the Fifth Circuit in Lemon, supra, but also with the decision of the Fifth Circuit in Harris v. Flota Mercante Grancolombiana, S.A., 730 F.2d 296 (5th Cir. 1984), and the decision of the Fourth Circuit in Gill v. Hango Ship-Owners/AB, 682 F.2d 1070 (4th Cir. 1982),

In Harris v. Flota Mercante Grancolombiana, S.A., supra, the Fifth Circuit sustained a recovery by a longshoreman who was injured when bags fell from a cargo stow and landed on him. While there was no proof in Harris that the cargo had been loaded by an independent stevedore in a foreign port, the Court sustained a recovery by the longshoreman on proof of knowledge by the vessel's mate of the unsafe condition of the stow. In Harris, as in the instant case, there was no claim of any "physical" defect in the cargo hold; rather, as in the instant case, the defect was in the "condition" of the cargo stow.

Similarly, in Gill v. Hango Ship-Owners/AB, supra, the Fourth Circuit sustained a theory of recovery on behalf of a longshoreman who alleged that he was injured by the improper manner in which cargo had been stowed in the hold of a

ship which required an unreasonably dangerous method of discharge. In Gill, as in Harris, there was no suggestion that there was any "physical" defect in the hold. The defect was in the manner of cargo stowage.

The foregoing two decisions, as well as the decisions in Turner and Lemon discussed in Point I of this Petition, all were decided following this Court's decision in Scindia. To the extent that the decision below makes a distinction between a defect in the "physical" work space and other types of defects, it is in conflict with these decisions -- a conflict which should be resolved by this Court in order to insure uniformity in the application of the longshoreman's negligence remedy under Section 5(b) of the Act.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that a Writ of Certiori should issue to review the Opinion and Judgments of the court below.

Respectfully submitted

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